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Article 11

Municipal Corporations - Liability for Nuisance

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Municipal Corporations—Liability for Nuisance.—The village of Hartland built a sewage disposal plant in conformity with plans approved by the state board of health. The plaintiff, an adjoining property owner, sought damages for the nuisance created by the foul odors which its operation spread over his premises. Judgment for the plaintiff.

Held, affirmed. A municipality, even in the performance of a governmental function, may not maintain a nuisance which injures the property of another. *Hasslinger* v. *Village of Hartland,* 290 N.W. 647 (Wis. 1940).

Where the municipal corporation performs a merely public service from which it derives no benefit in its corporate capacity, it performs a governmental function. *Folk* v. *Milwaukee,* 108 Wis. 358, 84 N.W. 420 (1900). Whether or not a municipal corporation is liable for the creation and maintenance of a nuisance in the performance of a governmental function depends upon its relation to the injured party. *Virovatz* v. *City of Cudahy,* 211 Wis. 357, 247 N.W. 341 (1933).

In most jurisdictions, including Wisconsin, the right to recover from a municipality for injuries sustained because of its maintenance of a nuisance in a governmental capacity does not exist in favor of a person towards whom the municipality was likewise acting in its governmental capacity. *Virovatz* v. *City of Cudahy, supra.* A municipality was held to be acting towards the injured party in its governmental capacity where fumes from a clogged sewer in a school building caused the fatal illness of a pupil. *Folk* v. *Milwaukee, supra.*

However, a municipal corporation in the management of its corporate property may not maintain a nuisance which is injurious to the property rights of others. *Winchell* v. *Waukesha,* 110 Wis. 101, 85 N.W. 668, 84 Am. St. Rep. 402 (1901). The flooding by a municipal corporation of sewage over the lands of another has been held actionable. *Sandlin* v. *City of Wilmington,* 185 N.C. 257, 116 S.E. 733 (1923). A city has been held liable to neighboring property owners for operating a sewage disposal plant which polluted the air with obnoxious gases. *City of Tyler* v. *House,* 64 S.W. (2d) 1007 (Tex. Civ. App. 1933). When a public shade tree fell on an adjoining landowner's premises damaging his home, recovery was allowed. *Jones* v. *Inhabitants of Town of Great Barrington,* 273 Mass. 483, 174 N.E. 118 (1930).

Although the municipality has caused injury to the property of another in the exercise of a governmental function, there will be no recovery for personal injuries caused by the same nuisance. *City of Louisville* v. *O'Malley,* 21 Ky. L. 873, 53 S.W. 287 (1899). Thus, where sewage backed upon the land of the plaintiff, causing her illness, recovery was had only for the harm to the premises. *Sandlin* v. *City of Wilmington, supra.* In Wisconsin, however, recovery was allowed for the wrongful death of the plaintiff's child caused by the child's drowning in a pond formed on the plaintiff's land because of the negligent construction of a public culvert. *Matson* v. *Dane County,* 172 Wis. 522, 179 N.W. 774 (1920).

Some courts hold a municipality liable for a nuisance maintained in performing a governmental function regardless of the municipality's relationship to the injured party. Thus, recovery was allowed for an injury sustained while using a diving board placed by a city over shallow water in a municipal swimming pool. *Hoffman* v. *City of Bristol,* 113 Conn. 386, 155 Atl. 499, 75 A.L.R. 1191 (1933).

The nuisance in the principal case arose from the location of the disposal plant rather than from its negligent operation. In a similar case in Michigan, the operation by a city of a piggery for garbage disposal was enjoined at the suit of neighboring property owners as a "nuisance per se." *Trowbridge* v. *City of Lansing,* 237 Mich. 402, 212 N.W. 73 (1927). ERNEST JOHANNES.